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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 516

INTERSTATE LIFE & ACCIDENT INSURANCE COMPANY,
*Petitioner,*

vs.

RKO TELERADIO PICTURES, INC.,
*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

## BRIEF ON BEHALF OF RKO TELERADIO PICTURES, INC., RESPONDENT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

## BRIEF ON BEHALF OF RKO TELERADIO PICTURES, INC., RESPONDENT.

The parties will be referred to according to their status in the District Court, that is, Plaintiff-petitioner as "plaintiff", and Defendant-respondent as "defendant".

Plaintiff's Petition for Writ of Certiorari does not come within the requirements of Rule 19 of this Court, nor does it present any "special or important" reasons for review. The Court of Appeals' decision is not in conflict

with the decision of any other Court of Appeals on the same issues; and it does not decide an important question of Federal law that has not been settled by this Court heretofore, or that conflicts with applicable decisions of this Court.

## COUNTER STATEMENT OF THE CASE.

Plaintiff's statement of the case is inadequate, incomplete and inaccurate in a number of respects and contains assumptions and conclusions totally unsupported by the record. For these reasons defendant believes it necessary to set forth a counter statement of the case.

This is a suit brought by the plaintiff as Lessor against the defendant, as Assignee of Lessee, under a written lease, seeking damages for partial breach of such Lease which contains a provision for the payment of rent in station identification announcements over defendant's television station in lieu of cash.

Plaintiff, Interstate Life & Accident Insurance Company, entered into a lease agreement with Harding College whereby plaintiff agreed to acquire land and construct a new building thereon in Memphis, Tennessee; to house Harding College's t.v. station, the lease to begin upon completion of the building and continue thereafter for a term of 10 years (Exh. 1, 429a).*

Harding College agreed to pay as rent to plaintiff a minimum of 20 "*station identification announcements*" each day. These station identification announcements were to contain an advertising display, which would

*This reference and all other references containing "a" are references to pages in defendant's appendix filed in the Court of Appeals.

verbally identify Interstate and also include the call letters of defendant's station, "WHBQ-TV". (Par. 7 of Exh. 1, 430a). Therefore, the station identification announcements called for under the Lease were what are known as a "shared I.D." (154-155a, 156a). During the entire 5-year period, the one and only advertising display consisted of the call letters "WHBQ-TV" accompanied by a verbal statement: "For a secure future, secure with Interstate Life & Accident Insurance Company." (324a).

Under the Lease, these 8-second station identification announcements or "shared I.D.s" were to be given in lieu of cash (44a).

Plaintiff's total investment was $151,000.00, comprised of $30,000.00 real estate cost, $112,000.00 building cost and $9,000.00 incidental expenses (39a). At the expiration of the lease the building and land would still be owned by Interstate, and the building would have depreciated at the agreed rate of 2% annually, or 20% in 10 years (Par. 8 of Lease, Exh. 1, 431a).

On July 9, 1954, shortly after the building was completed Harding College sold its t.v. station to defendant, RKO, and assigned the Lease to RKO, which company assumed all the obligations of the Lessee (38a).

Thereafter, defendant commenced to operate the t.v. station and furnish station identification announcements to plaintiff. On December 28, 1956, the manager of RKO wrote plaintiff advising that the station had missed certain announcements and offering to make them good (309-310a), to which plaintiff replied that it was considering the matter and would write further, but failed to do so. It made no complaint until May, 1959 (316a).

On December 9, 1959, plaintiff filed suit in the U. S. District Court for the Western District of Tennessee to

recover damages in the amount of $700,000.00, of which $400,000.00 was alleged to be for the reasonable value of the omitted announcements and $300,000.00 for loss of profits (6a). On December 4, 1961, with leave of Court, *plaintiff waived* and withdrew its *claim for loss of profits* (15a).

The District Court overruled defendant's motion for directed verdict made at conclusion of plaintiff's proof (138a) and renewed at the conclusion of all the proof (400a). The jury returned a verdict in favor of plaintiff and assessed its damages for breach of contract in the amount of $150,000.00 and awarded it $15,900.00 for attorney's fee and expenses for a total of $165,900.00 (15-16a).

Defendant filed a Motion for Judgment Notwithstanding Verdict or for Order Granting New Trial (17a). The motion was overruled (31-32a), following which defendant appealed the judgment to the Court of Appeals for the Sixth Circuit on the ground that the verdict and judgment were excessive, and on the ground that the Court as a matter of law had committed errors relating to questions of evidence and had erroneously instructed the jury. The Court of Appeals reversed the judgment of the District Court and remanded the case to the District Court for a new trial, but gave plaintiff the option of filing within 20 days from the entry of the judgment a remittitur in the sum of $134,000.00. It is this judgment which plaintiff now asks this Court to review.

The period of time involved in plaintiff's claim is approximately 5 years, or 1,793 days. During this period if WHBQ-TV had been on the air every day for a full operating day it would have been required to furnish a minimum of 35,860 station identification announcements (20 minimum per day X 1,793 days) (171a; Exh. 44, Col.

1, 455a). However plaintiff waived claim for 1050 announcements not given due to "late sign-on"; thus, the net result was 34,810 station identification announcements required under the lease for the 5-year period.

During this same 5-year period defendant actually delivered 27,496 station identification announcements (171a; Exh. 44, Col. 2, 455a), or an average of approximately 15 announcements per day (393a).

According to plaintiff's computation, the net shortage amounted to 12,208 station identification announcements (114a, 380a), or approximately 1/3 of the station identification announcements called for under the Lease (46a, 131a).

The undisputed proof shows that the shortage was inadvertent and unintentional; that defendant did not have an accounting system at the time for shared station identification announcements as it did for other advertisers and no check-off system against laxity of the traffic clerk who scheduled the announcements (169a, 170a, 226a, 294a, 305-306a).

The proof is undisputed that there are various ways in which a television station uses its television announcement time between and within programs. This time can be: (1) sold as a commercial announcement; (2) used in identifying the station, either alone or shared with an advertiser; (3) used to promote programs to be presented over the station at a later time; (4) given to charities (Heart Fund, etc.), which are called public service announcements; or (5) used for news bulletins. The station does not receive money for any of the above uses of time other than commercial announcements or shared station identification announcements (155a).

Even though paragraph 7 of the Lease permits the station to sell 20 "station identification announcements" per week (but not more than 4 per day in any one given day), defendant did not sell any of such station identification announcements (226a), and as a matter of *undisputed* fact, the station never sold any "station identification announcements" of any kind to anyone at any time other than those sold to Interstate under said Lease (224a, 307a).

Paragraph 8 of the Lease provides that Interstate, as Lessor, had the right to discontinue receiving the 8-second station identification announcements; and if it elected to do so, then *Defendant had the option* of (1) permitting Interstate to sell said advertising time to a third party, or (2) paying Interstate cash rent in an amount computed in accordance with a formula set forth in the Lease, based on taxes, insurance, annual depreciation and the Lessor's net investment (Exh. 1, 431-432a), which amounted to $9,600.00 per year (44-45a).

Therefore, there was no possible way under said Lease that Interstate could sell any of the announcements called for under it to anyone without the consent of defendant (45a; 410a, Exh. 1, 431a). *Clavin Johnson, President of Interstate, clearly admitted this fact* (45a).

During the 5-year period in question defendant published rate cards that reflected the current rates charged by WHBQ-TV for various types of advertising time in various quantities (160a, 294a). Volume discounts were allowed on all rate cards (160a, 294a), and the prices varied with the length of time of each announcement and the quantity of announcements purchased (160a). The largest discount on any rate card was for 12 announcements per week; and none of defendant's rate cards dealt with

shared I.D.'s or with quantities as large as 140 announcements per week, which was the minimum number of announcements called for under the Lease (136-137a). These rate cards were offered in evidence by plaintiff and admitted by the Trial Court over defendant's objection. The Court of Appeals held this to be error.

Defendant contended that since paragraph 8 of the Lease provides that if plaintiff elects not to use the announcements to which it is entitled under the Lease the *defendant* has the alternative of paying its rental in cash or permitting plaintiff to sell the announcements, that this provision clearly shows that the parties to the Lease originally *contemplated* that the announcements called for under the Lease were substantially equivalent to the alternative cash rent of $9,600.00, as computed in accordance with the formula in paragraph 8 of the Lease, and that said Lease by its very terms evaluates those announcements by agreement of the parties (9-10a; 45a; Exh. 1, 431a).

It is undisputed that during this 5-year period plaintiff annually filed sworn reports to the Department of Insurance and Banking of the State of Tennessee (51-53a; Exh. 6a; Col. 13, 443a), and Federal income tax returns (54a, Exh. 7a, 445a), each of which reported the receipt by plaintiff of an annual rent in kind on its building of $9,600.00 per year. Defendant accordingly contended at the trial that plaintiff is estopped from asserting that the station identification announcements called for under the Lease have a value greater than $9,600.00 per year (10-11a).

Defendant introduced detailed proof by four expert witnesses in the television industry that the Lease called for so many daily announcements that a point of "saturation" had been reached (142-143a, 295-297a, 329-331a, 353a,

418-419a) whereby any announcements in addition to those actually furnished had no value as advertisements, but would serve merely to annoy or irritate listeners (8-9a; 148-149a, 292a, 329-331a, 354a); and therefore defendant contended that plaintiff had not been damaged at all, or at most was entitled to only nominal damages. This proof was controverted; but it was conceded that once a large number of announcements have been given, any additional announcements which may be given have a substantially reduced value (87a-89a).

Turning now to plaintiff's *Statement of the Case*, it is interesting to note that on pages 6-8 of its petition, plaintiff refers to certain "proof (numbered 1 through 10) on the issue of damages" as being in the *record*.

Plaintiff does not, however, advise this Court anywhere in its entire petition that the Court of Appeals as a matter of *law* held:

(1) That the rate cards introduced in the lower court by plaintiff, over defendant's objection, were inadmissible evidence; (Court of Appeals Opinion, 318 F.2d 73, 77).

(2) That the Trial Judge erred in instructing the jury that it could consider the rate cards in arriving at a fair and reasonable value of the television time. (Court of Appeals' Opinion, supra, 77-78).

In ruling that the rate cards were inadmissible, the Court of Appeals said (page 77):

(1) "None of the rate cards dealt with shared station identification announcements or quantities as large as involved in the case at bar"; and

(2) "Interstate's measure of damages was not the price for which RKO could sell advertising to others, because under the terms of the Lease, Inter-

state had no right to sell the announcements to which it was entitled."

The proof recited in paragraphs 2, 4, 5, 7, 9 and 10 (on pages 6-8 of Plaintiff's Petition) directly relates to the defendant's rate cards, or is proof of facts that are based upon said rate cards, and therefore, under the ruling of the Court of Appeals, is not "in the record."

Plaintiff concludes on page 8 of its Petition that the proof set forth in paragraphs (1) - (10) clearly establishes a "*fact issue* as to what damages may reasonably be said to have been within the contemplation of the parties as a probable result of the breach of contract." In arriving at this conclusion, plaintiff again disregards the fact that the Court of Appeals ruled inadmissible the rate cards and all proof based upon them. Defendant asserts that the only *admissible* proof on the issue of damages cited by plaintiff is set forth in paragraphs 1, 3, 6 and 8 of plaintiff's petition, and defendant respectfully submits that such proof does *not* establish a fact issue as to what damages might have been within the contemplation of the parties as a result of a breach of contract, but on the contrary supports the holding of the Court of Appeals that no such fact issue exists.

Aside from the question of admissibility, it is pertinent to note that the facts set out in paragraph (4) on page 7 of plaintiff's petition are wholly and completely unsupported by the record; and that the statement set out in par. (5) is not correct. To the contrary, the proof was *undisputed* that the station never sold any "station identification announcements" of any kind to anyone at any time, other than those sold to plaintiff under said Lease (226a, 307a). Since station identification announcements were admittedly the *only* type of announcements

to which plaintiff was entitled under the Lease (430a), it follows that if defendant sold no such announcements it could not have sold any television time to which plaintiff was entitled.

It is also pertinent to note that paragraph (9) on page 8 of plaintiff's petition refers to the fact that the defendant's manager wrote a letter in which he "measured the value of plaintiff's television spot announcements in terms of cash. . ." This statement is not correct. The date of this letter is December, 1956 (*not* December, 1959), and the record is clear that it never was the intention of the manager in this letter to attach any monetary value to the announcements, but only to establish a ratio upon the basis of which those announcements missed could be made up (314-315a, 317a, 322a, 327a). However as the Court of Appeals notes plaintiff did not wish these announcements made up in kind, as indicated by its failure to act upon this letter for over two years (316a).

## PLAINTIFF'S SUMMARY OF OPINION OF THE COURT OF APPEALS.

On page 9 of its Petition plaintiff sets forth what purports to be a *summary* of the action of the Court of Appeals, which it designates "Opinion of the Court of Appeals". This is in fact plaintiff's own *conclusions* as to what the Court of Appeals held.

For example, plaintiff *concludes* that the Court of Appeals only looked to a *part* of the alternative provisions of paragraph 8 of the Lease contract (erroneously called paragraph 7 in plaintiff's Petition), and that it completely ignored the immediately preceding clause of the contract, which plaintiff states "contemplated that petitioner be entitled to sell its allotted television time for cash or its

own account if it ever elected to discontinue its advertising program". This statement of plaintiff implies that the quoted provision is an accurate and complete summary of the contract provision when in actuality this is a complete misstatement. The contract does *not* provide that petitioner has the unqualified right "to sell its allotted television time". Clavin Johnson, President of Interstate, admitted on the stand that plaintiff was *not* entitled to sell the television time called for under the Lease to anyone, *without the consent of defendant* (45a). Defendant likewise so interpreted the Lease (422a, Special Instruction Requested No. 16), as did the Trial Judge (410a) and the Court of Appeals (plaintiff's Petition page 31).

## ARGUMENT.

### QUESTION I.

**There Is No Competent Evidence in the Record to Support a Verdict in the Amount Returned by the Jury.**

The Court of Appeals in this case did not reduce the verdict and judgment *per se* as plaintiff states in its petition. That Court reversed the judgment and remanded the case to the District Court for a new trial, but gave plaintiff the option to remit its judgment, if plaintiff desired to so do. This does *not* violate the 7th Amendment to the United States Constitution. *Ark. Valley Land Co. v. Mann Colo.*, 130 U.S. 69, 32 L. Ed. 854, 9 S. Ct. 450; *Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41, 39 L. Ed. 889, 15 S. Ct. 751; *3 A.J., Appeal and Error*, § 1179, pp. 687-688.

The Court of Appeals *does* have the power to remand the case for a new trial, unless plaintiff files a remittitur to plaintiff's judgment, and the exercise of such power does not involve the substitution of the Court's finding of fact for that of the jury, or amount to a usurpation by the Court of the province of the jury, when the amount of the recovery is excessive, and the excess may be so segregated that the Court can distinguish and separate the erroneous part, or the excess is capable of correction by computation. *Hanson v. Boyd*, 161 U.S. 397, 40 L. Ed. 746, 16 S. Ct.; *Ark. Valley Land Co. v. Mann Colo., supra; Koenigsberger v. Richmond Silver Mining Co., supra; 3 A.J., App. & Error*, §1173, §1174, pp. 682-685. This power is within the discretion of the Court. *Northern Pac. R.R. Co. v. Herbert*, 116 U.S. 642, 29 L. Ed. 755; *Ark. Valley Land Co. v. Mann, supra.*

As stated in *3 A.J., App. & Error*, §1177, p. 687:

"In so affirming a judgment on condition of remittitur, the Court is not substituting its judgment

for that of the jury. By such action the Court does not indicate what amount it would have given, but only such amounts as it would not feel at liberty to pronounce excessive."

Under the generally accepted rule, a Court may permit an amount included by reason of "an *erroneous instruction of the trial* court, or the *erroneous admission of evidence*, to be remitted, and affirm the judgment for the reduced sum provided it can determine the amount of such items or segregate them. . ." (*3 A.J., App. & Error*, §1174, p. 684). *See also*: *4 C.J., Appeal & Error, Sections 3147 (aa), 3148 (bb), 3150 (cc)*.

As stated in *5B C.J.S., §1869, page 312 and pages 313-314*:

> "The *improper admission or rejection of evidence* whereby the jury are caused to return too large a verdict will not necessitate the granting of a new trial if appellee remits a portion of his recovery fully sufficient to cover the amount of excess produced by such error, and, after such remission, the judgment may be affirmed as to the balance."
>
> ". . . the courts have frequently allowed remittiturs in cases where an excessive verdict was caused by an *erroneous instruction as to the measure of damages generally* . . . or where the court erroneously *submitted to the jury an element of damage unsupported by competent evidence*." (Emphasis supplied).

The above principle of law has been applied by practically every court in the country: by this Court in the case of *Hansen v. Boyd*, 161 U.S. 397, *supra* (an erroneous instruction affecting the size of the verdict); by the Supreme Court of Tennessee in the cases of *Sou. Ry. Co. v. Shipley*, 147 Tenn. 40, 245 S.W. 525 (a contract action—erroneous admission of evidence and erroneous charge to jury as to measure of damages) and *National Life & Acc.*

*Ins. Co. v. Morrison*, 179 Tenn. 29, 162 S.W.2d 501 (personal injury action—Court erroneously submitted element of damages unsupported by competent evidence); and by the 6th Circuit Court of Appeals in the cases of *Mosby* v. *U.S.*, 194 Fed. 346, 350-351 (erroneous instruction to jury on element of damages covering excessive verdict), and *C. J. Huebel Co.* v. *Leaper*, 188 Fed. 769 (erroneous admission of evidence and instruction to jury affecting size of verdict) wherein it cites the case of *American Nat. Bk.* v. *Williams*, 101 Fed. 943 (8th Cir.) (erroneous instruction to jury on element of damages causing excess verdict which amount of excess could be determined by mathematical computation). The 2nd Circuit Court of Appeals applied this principle in an action for deceit in the case of *Loewer* v. *Harris*, 57 Fed. 368 (jury verdict of $8,741.67 was remitted because the erroneous instructions to jury on damages were only injurious to the extent that the jury allowed damages in addition to the $5,000.00 that plaintiff was entitled to).

In the instant case, the Court of Appeals (318 F.2d 173, 77-78) properly found, as a matter of law, both an *erroneous admission of evidence* (the rate cards) and an *erroneous instruction to the jury* by the Trial Judge (charging that the rate cards could be considered in measuring plaintiff's damages), based upon its holding that the amount charged other advertisers in the open market for advertising of different types and in different quantities was inadmissible.

On these points the Court's ruling was a matter of law, *not fact* as contended by plaintiff on page 11 of its Petition, and was based upon its interpretation and construction of paragraph 8 of the Lease, which was plain, clear and unambiguous, and which established as a matter of law that plaintiff could not sell the station identification announcements to which it was entitled under the

lease without defendant's consent, thus depriving them of any market value which they might otherwise have.

There is no question but that interpretation and construction of an unambiguous written contract is for the *Court* as a *matter of law*. *Hamilton* v. *Liverpool & London & Globe Ins. Co.*, 136 U.S. 242, 34 L. Ed. 419, 10 S. Ct. 945; *Godson* v. *MacFadden*, 162 Tenn. 528, 39 S.W.2d 287; *Toomey* v. *Atyoe*, 95 Tenn. 373, 32 S.W. 254; *Barker* v. *Freeland*, 91 Tenn. 112, 18 S.W. 60.

The Supreme Court of Tennessee in the *Toomey* case, *supra*, on page 381 said:

> "What the written agreement of the parties means on its face, what the extent of the obligations assumed and imposed thereby, are questions of *law* to be decided by the *Court* as contra-distinguished from a jury, and for ultimate decisions of this Court." (E.S.).

In interpretating and construing a contract, the law is clear that the Court has the duty to determine the intention of the parties. The Supreme Court of Tennessee in its opinion in the case of *Perkins Oil Co.* v. *Eberhart*, 107 Tenn. 409 (64 S.W. 760), held it was a cardinal rule of construction that all instruments are to have the "effect given them according to the *manifest* intention of the parties, as apparent from the whole *instrument*. . ." (p. 415). In short, the Court must look to the *four corners of the contract*. Its language controls when plain and unambiguous. And as later stated by the Supreme Court of Tennessee, the Court should determine what the intention of the parties was *"as actually embodied and expressed in the instrument as written."* *Petty* v. *Sloan*, 197 Tenn. 630, 642, 277 S.W.2d 355, 360.

In the instant case, paragraph 8 of the Lease clearly provided that Interstate, as lessor, had the right to discontinue receiving the station identification announcements; and if Interstate elected to exercise such right, then *de-*

*fendant had the option* of (1) permitting plaintiff to sell said advertising time to others, or (2) paying plaintiff cash rent in an amount computed in accordance with a formula set forth in said Lease (Exh. 1, 431-432a).

The Court of Appeals did not favor one of the alternative clauses of paragraph 8 over the other as plaintiff contends on page 11 of its Petition, but the Court looked at the whole Lease, including *both alternatives* set forth in paragraph 8 thereof, and held as a matter of law that plaintiff did not have the unqualified right to sell said announcements called for under the Lease.

In so ruling, the Court of Appeals no doubt recognized the rule of "practical construction". That is, the construction and interpretation given by the parties themselves to a contract is always persuasive to the Court. *Chicago* v. *Sheldon*, 9 Wall. 50, 19 L. Ed. 594; *Sherman* v. *Cate*, 159 Tenn. 69, 72, 16 S.W.2d 25; *State* v. *Vanderbilt Univ.*, 129 Tenn. 279, 164 S.W. 1151; 8 Williston, Contracts, § 623. In this regard, the proof showed that the Lease was so clear, plain and unambiguous in its expressed meaning that all three, the plaintiff (45a), the defendant (42a, So. Instr. #16) and the Trial Judge (410a) concurred that under said Lease plaintiff could not sell the announcements.

Therefore, once the Court of Appeals as a matter of *law* so interpreted the Lease, then it logically followed that the rate cards and any proof as to the price at which such advertising could be sold on the open market was *not* material or competent evidence of plaintiff's damages, *nor* was the same within the contemplation of the parties as a probable result of any breach of the Lease.

From this it resulted that plaintiff's sole proof of its alleged damages, the *mathematical computation based upon the rate cards*, which was the only evidence which could conceivably support a verdict in the amount that the

jury found, also became inadmissible as a matter of law, and was thus *expunged* from the record.

Nevertheless plaintiff, on pages 12-13 of its Petition, refers to certain supposed proof in the *record*, just as it did in its "Statement of The Case", and again fails to tell this Court that the facts set forth in paragraphs 3-5 were held by the Court of Appeals to be inadmissible evidence and are therefore not in the *record*.

In paragraph (6) on page 13 of its Petition, plaintiff again states that the Court of Appeals favored one of the alternative provisions in paragraph 8 of the Lease over the other, whereas it is obvious that the Court did not do so, but to the contrary the Court construed the *entire* Lease including all of the provisions of paragraph 8. Plaintiff quotes part of paragraph 8 of the Lease (p. 13 of Petition) out of context and again erroneously implies that plaintiff had the unqualified right to sell said announcements if it desired to do so.

When these paragraphs are deleted from the record, plaintiff is left with only the *admissible facts* set forth in paragraphs (1) and (2) on page 12 of its Petition, and it cannot possibly be contended that these two facts constitute proof as to "measure of damages" which would support a verdict of $150,000.00.

Plaintiff loosely refers to "*value*" of advertising in both paragraphs (2) and (7) on pages 12-13 of its Petition and in the next to last paragraph of Argument I on page 17 of its Petition. The entire issue in this lawsuit on the question of damages involved a determination of "*value*"; but there is *no proof* in the record to support a statement that the "market" value of the advertising was the sole inducement for plaintiff to enter into the Lease! If this is what plaintiff means in said paragraph (2), then plaintiff again quotes an alleged fact that is totally unsup-

ported by the record. (Incidentally, plaintiff fails to cite a reference to the Appendix.) On the contrary, the Lease itself negatives any idea of market value by depriving plaintiff of the right to sell the announcements except with defendant's permission. The Lease clearly shows that the parties not only considered, but *contemplated* and intended that the "*value*" of the advertising announcements was equivalent to the $9,600.00 alternative "cash rent", as computed in the formula set forth in paragraph (8) of the Lease.

## ALL OF THE COMPETENT EVIDENCE IN THE RECORD SUPPORTS THE VERDICT AS REMITTED.

Once the evidence based on the rate cards is expunged from the record as a matter of law, then as the Court of Appeals held, the *balance* of the *evidence in the record*, and the only admissible evidence, which includes the *Lease itself*, supports the verdict only in the amount remaining after the remittitur which the Court suggested.

Without the rate cards and the computation based upon them, the excessive portion of the verdict must fall, *it being easily distinguishable and separable from the value of the announcements as clearly spelled out within the Lease itself.* The consideration given for the announcements was the use of plaintiff's building; the fair rental value of the building was $9,600.00; therefore, the value of the announcements was $9,600.00.

Here once again the Court of Appeals, pursuant to sound legal principles of interpreting and construing a contract, looked to the *four corners of the Lease*, including paragraphs 8 and 9 thereof, together with the action of the parties under said Lease. By so doing, the Court of Appeals found that paragraph 8, *agreed upon by both parties*, had a clause therein that protected the defendant *in the event plaintiff decided not to continue* to consume

the station identification announcements, under which defendant could determine whether it would pay Interstate cash rent of $9,600.00 or permit Interstate to sell the advertising. *This clause clearly showed the intention of the parties*, which was that under no circumstances would defendant be liable for more than $9,600.00 annual rent, whether in cash or in kind. The clear and inevitable result of such a clause is this:

> If, at the time plaintiff elected not to continue receiving announcements:
>
> (a) Said announcements were of *more value* on the open market (as plaintiff claimed at the trial based upon its mathematical computation), than the cash rental provided in the Lease, then defendant could have paid the cash rent of $9,600.00 and plaintiff would have been bound to accept the station's election;
>
> (b) Said announcements were of *less* value on the open market than the cash rental provided in the Lease, then defendant could have demanded that plaintiff sell the announcements (refusing to pay $9,600.00), and plaintiff would have been bound to accept the station's election.

At the time the Lease was executed and agreed upon by both parties, neither of them knew whether this clause would come into play or if so under what circumstances; but it represented their agreed evaluation of the consideration for the Lease of the building. The fact this clause never became effective because plaintiff never elected to discontinue receiving said announcements is immaterial.

The important point is that the parties recognized, *when they signed the Lease*, that said clause *might in the future become effective*, and if such did become so, *plaintiff could never over defendant's objection receive rent greater than $9,600.00.*

In short, both parties *agreed* that the rent to be paid in kind (the advertising announcements) had a *maximum value* equivalent to $9,600.00 per year.

That such was the mutual intention and contemplation of the parties as reflected within the four corners of the Lease, is *corroborated* by the action of plaintiff during the 5-year period, when plaintiff reported its income from the building to both the Department of Insurance and Banking of the State of Tennessee and the Internal Revenue Service of the United States at $9,600.00 annually (51-52a, 54-55a, Exh. 6). Therefore, the record clearly reflects that plaintiff itself recognized the *value* of the announcements called for under the Lease were equal to the alternative method of paying cash rent incorporated in Paragraph 8 thereof.

Thus, after expunging the inadmissible evidence based on the rate cards, the Court of Appeals was compelled as a matter of law to hold that, based upon the unambiguous language of the Lease and the conduct of plaintiff in reporting its income under it, a verdict of no more than $9,600.00 could be supported in the record. This required either a new trial or a remittitur, and the Court gave plaintiff the option as to which it should be.

Plaintiff in its petition cites various legal authorities to support its position, none of which are applicable to the instant case, as plaintiff completely ignores the holding of the Court of Appeals that the Trial Court committed prejudicial error, as a matter of law, in admitting the rate cards as evidence and instructing the jury it could consider them in arriving at its verdict.

For instance, plaintiff cites the case of *Parsons* v. *Bedford*, 28 U.S. 433, 7 L. Ed. 732, but fails to tell this Court that it differs from this case in that therein the defendant failed to raise any points of law growing out of the evidence admitted at the trial, or complain of any error in the Court's

instruction to the jury. In this regard the Supreme Court spoke of the Judiciary Act and said on page 448:

> "And the *appellate jurisdiction has also been amply given by the same act (Secs. 22, 24) to this court to redress errors of law: and, for such errors to award a new trial in suits at law which have been tried by a jury.*" (Emphasis supplied).

Plaintiff also cites the case of *Fairmount Glass Works v Cub Fork Coal Co.*, 287 U.S. 474, but again neglects to give this Court the full picture. Unlike the instant case, the Court's "Charge to the Jury" in the Fairmount case was not excepted to as such, and none of plaintiff's special requests for instructions related to the "measure of damages". On page 486 of the opinion the Supreme Court said:

> "The respondents contend that the District Court *erred in charging . . . the measure of damages . . .; and that this error may be relied upon here in support of the judgment of the Court of Appeals.* . . . There was *no request for an instruction* on this subject and *no objection was made to that given* until after the jury had retired . . . We have, therefore, no occasion to consider the meaning of the charge given, *its correctness as a matter of law, or the materiality of the error, if any, in giving it.*". (Emphasis supplied).

This Court has clearly ruled that when a verdict is grossly excessive as a result of erroneous instructions to the jury on the measure of damages, such an error of law may be the ground for reversal of a lower verdict by an appellate court, without such action on the part of the appellate court being in violation of the 7th amendment to the United States Constitution. *Chesapeake and Ohio R. Co. v. Gainey*, 241 U.S. 494, 496, 60 L. Ed. 1124, 1125, 36 S. Ct. 633.

Plaintiff also cites the case of *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, but that case is clearly not authority to support plaintiff's position, as it does not

enunciate any principles of law which would preclude a Court of Appeals from reversing a verdict and judgment in the lower court on the ground of prejudicial error through erroneous admission of evidence by the Trial Judge and erroneous instruction on the measure of damages to the jury.

Plaintiff cites the case of *United States* v. *Johnson*, 327 U.S. 106, which involved the sole question as to whether or not the Court of Appeals had the right to review a Trial Court's finding of fact; which was that a government witness had not committed perjury, based upon affidavits filed by defendant in support of his motion for new trial. Again, that case does *not* involve prejudicial *errors of law* made by the Trial Court as a result of erroneously admitting evidence and instructing the jury.

Plaintiff cites the case of *Still* v. *Townsend*, 311 F.2d 23 (6th Cir.). *Unlike the instant case*, the *Still* case, *supra*, did not involve any erroneous admission of evidence, or erroneous instruction to the jury, on the question of measure of damages, which errors on the part of the Trial Court in the instant case were prejudicial errors affecting the size of the verdict. The *Still* case thus fails to support plaintiff's position.

In the instant case, the Court of Appeals did nothing more than follow the overwhelmingly accepted general rule, which was clearly enunciated by the Court of Appeals in the case of *Virginian Ry. Co.* v. *Amentrount*, 166 F.2d 400 (4th Cir.), where the Court said on page 407 that a Court has the duty to set aside a verdict that is "so *excessive* that it *cannot be justified by anything in the record* . . ." and the discretion of the Trial Judge in this regard is "to be exercised in the *light of the record*." (E.S.).

If the Court of Appeals was correct in expunging all evidence based on the rate cards from the record, then

the verdict is clearly excessive when considering the *balance of the record.*

What is the *balance* of the record as it relates to plaintiff's measure of damages:

> The alternative method of paying $9,600.00 cash rent pursuant to the formula *agreed upon* by the parties in the Lease (Exh. 1, Paragraph 8; 431a), corroborated by the action of plaintiff in reporting the rent in kind as gross income in the sum of $9,600.00 (45a; 51-53a; Exh. 6a, col. 13, 443a; 54a; Exh. 7a, 445a).

*The balance of the record supports the action of the Court of Appeals* in separating the excessive portion of the verdict and *computing the maximum award* to which plaintiff is entitled as equal to one-third of the $9,600.00 annual rent for 5 years, a total of $16,000.00. As the Court of Appeals said in its opinion on p. 78: "There was no evidence of *other* damages." (Emphasis supplied)

As stated in *5B, C.J.S. §1869, page 311,* where the damage "resulting from the error can be segregated from the verdict which is *otherwise supported by the evidence* . . ." (E.S.) the remitted judgment can be affirmed.

This Court, in the case of *Hanson* v. *Boyd*, 161 U.S. 397, *supra*, applied the rule of remittitur when size of the verdict was affected by an erroneous instruction of the lower court to the jury, and said on page 411:

> "The rule has been adopted by this court *that it is proper*, either for the trial court upon an application for a new trial, *or for an appellate court in reviewing a judgment, to permit the party in whose favor a verdict or judgment has been returned or entered to avoid the granting of a new trial on account of error affecting only a part thereof, by entering a remittitur as to such erroneous part, when the court can clearly distinguish and separate the same.*" (Emphasis supplied).

The ruling in the *Hanson* case was in line with previous decisions of this Court including that of *Northern Pacific R. R. Co.* v. *Herbert*, 116 U.S. 642, *supra*, wherein this Court said on page 647:

> "In requiring the remission of what was deemed excessive it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could, therefore, be properly allowed to stand."

In the instant case the Court of Appeals, in computing *$16,000.00* as the *maximum* amount of damages supported by the *remaining evidence* in the record, reduced the verdict to the highest amount the jury could have awarded under the remaining evidence, and thereby conformed to the general rule set forth in *5B C.J.S.*, *§1870, pp. 315-316*, which says:

> "On the other hand, it has been held that the reviewing court is not justified in reducing the verdict below the *highest amount the jury could award under the evidence.*" (Emphasis supplied).

## QUESTION II.

**Based upon the Only Competent Evidence in the Record the Value of the Announcements to Plaintiff Was Equal to the Value of What Plaintiff Gave in Exchange for It, Which Was the Rental Value of Its Building.**

Throughout these entire proceedings, whether inadvertently or by design, plaintiff has confused "value" with "price." (111a-112a, 115a-116a). In an effort to establish the "price" at which advertising similar to that which plaintiff was to receive under the lease was offered to the public by defendant, plaintiff offered in evidence defendants' published rate cards, which the Trial Court admitted

for that purpose (113a). But in doing so the Court limited the purpose for which these "Rate Cards" were admitted, saying to plaintiff's counsel of the witness who introduced them:

> "Of course, this witness is not an expert on advertising as such, and, of course, he can't testify as to values of advertising and I don't think you intend for him to.
>
> "Mr. Price: No, sir. He just made these calculations.
>
> "The Court: What you are doing is as an accountant, you are letting him testify as to how he computed the damage, *assuming that his method is proper*, and no more." (112a) (Emphasis supplied).

Accordingly, in overruling defendant's motion for a directed verdict, the Trial Court said to defendant's counsel:

> "On the question of the amount of damages, the Court has, of course, admitted in evidence the official rate card introduced* by the defendant television station and, of course, I understand your objection to that, that that is not of any probative value on the issue of damage in this case, and the Court has overruled you on that, so *if the Court is right in overruling you on that*, then certainly it is some evidence of damage." (401a. Emphasis supplied.)

It is, therefore, apparent that the whole theory upon which plaintiff's case was tried was that the rate cards, which showed the price at which defendant offered various types of advertising in various quantities to the public, were evidence of the value to plaintiff of the advertising which it was entitled to receive under the lease. But, as the Trial Court clearly indicated in the two quotations above, if this is not the case, then the Court is necessarily relegated to some other basis for determining the extent of that

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*This is clearly a typographical error and should be "published".

damage. And the only other basis in the record is the lease itself, together with the amount of income which plaintiff reported to the Government authorities that it was receiving under it.

On appeal, the Court of Appeals held the rate cards inadmissible. This is apparent from the opinion of that Court (318 F.2d 73, 77), although it would be difficult to ascertain from plaintiff's Petition, where it is repeatedly stated that these rate cards constitute "proof on the issue of damages (which) is in this record" (Plaintiff's Petition, p. 6). Clearly it is one of the functions of a Court of Appeals to review the Trial Court's rulings upon the admissibility of evidence, and other than under exceptional circumstances this Court will not re-examine its action in doing so. That no such circumstances exist is apparent from the Court of Appeals' own statement of its reasons for ruling that this evidence should be excluded:

> "There was no evidence that R.K.O. during the time in question sold to others any of the contracted for station identification announcements." (381 F.2d 73, 76).
>
> "None of the cards dealt with shared identification announcements or quantities as large as involved in the case at bar." (381 F.2d 73, 77).

In other words, the rate cards dealt with the *price* at which defendant offered to sell different types of advertising in different quantities to the general public, not the *value* of the advertising which it was entitled to receive under the lease to plaintiff. So defendant had insisted at the trial, and so the Court of Appeals held.

What is value? A glass of water, which has little intrinsic worth, may be extremely valuable to a man lost in the desert. On the other hand a T-Bone steak, which bears a high price tag on the menu, is of little worth to a man who has just completed a hearty meal. The value

of anything, it would appear, consists of one or more of three elements: (a) the benefit which it will confer by its use, or (b) the amount for which it can be sold to others, or (c) the value of that which was given in return for it.

But in the instant case plaintiff is foreclosed from relying upon either of the first two elements, the first both by operation of law and by specific waiver and the second by the provisions of the lease itself. The benefit, and the only benefit, which the use of advertising can confer upon the user is obviously an increase in business and a consequent increase in profits. But under the Tennessee case of *Morristown Lincoln Mercury* v. *Lotspeich Pub. Co.*, 42 Tenn. App. 92, and similar decisions, loss of profits under these circumstances is too speculative and remote to justify a recovery, and in any event plaintiff has specifically waived any such claim (15a). Accordingly, the Court of Appeals held:

> "Undoubtedly the reason Interstate accepted the television announcements in lieu of cash rent was to secure new business through advertising thereby increasing its profits, but we cannot consider loss of profits because Interstate has waived that claim. Its waiver was probably influenced by Tennessee law which required more proof of loss of profits than mere conjecture or guesswork." (318 F.2d 73, 76-77).

As to the second element, the amount for which plaintiff could have sold the advertising to which it was entitled under the lease, this has no bearing upon the instant case because under the terms of the lease itself none of this advertising could be sold by plaintiff except with defendant's permission (431a), which was never sought nor given (45a). This was expressly recognized by plaintiff's president, who testified:

> "Q: But there was no way under this lease as you understood it, was there, Mr. Johnson, that Inter-

state could sell any of these spots to anybody else without the consent of the lessee? A. That's correct, sir." (45a).

This testimony is not really necessary to elucidate this provision of the lease, for it is perfectly clear and unambiguous upon this point. Under these circumstances, it is for the Court to construe it as a matter of law. *Barker* v. *Freeland*, 91 Tenn. 112, 18 S.W. 60; *Toomey* v. *Atjoe*, 95 Tenn. 373, 32 S.W.2d 254; *Petty* v. *Sloan*, 197 Tenn. 630, 277 S.W.2d 355. As stated by the Tennessee Supreme Court in the latter case, "A Court is not at liberty to make a new contract for parties who have spoken for themselves." (pp. 639-640). Accordingly the Court of Appeals held:

> "Interstate's measure of damages was not the price for which RKO could sell advertising to others because, under the terms of the lease, Interstate had no right to sell the announcements to which it was entitled." (318 F.2d 73, 77).

With these two elements out of the picture, plaintiff was relegated to whatever other evidence remained in the record to support its claim for damages. Obviously the advertising had no market value, for it could not be sold; and where "there is no demand for a thing and *no ability to sell the same*, then it cannot be said to have a market value." 15 *Am. Jur.* 531 (Damages, §122) (Emphasis supplied). And the same treatise says elsewhere:

> "Where personal property is without market value, then the law allows the next best evidence to be given to ascertain its value. In such cases, evidence as to cost and other considerations which may effect value; or which tend to show its worth, actual, real, or intrinsic, is admissible." (20 *Am. Jur.* 339 (Evidence, §372)).

In the absence of the rate cards, what evidence of value remains in the record? The only such evidence is

the lease itself (428a-441a) and the returns and reports which plaintiff filed with the Internal Revenue Service and the Tennessee Department of Insurance and Banking (Exhibits 6-16). Both this lease (45a) and these returns and reports (51a, 52a, 54a, 55a, 57a) place a valuation upon the total amount of advertising due under the lease of $9,600.00 annually.

Thereafter, it becomes merely a matter of mathematics to determine the maximum recovery to which plaintiff would be entitled. Plaintiff claims a shortage of approximately one-third (1/3) of the advertising due it under the lease for a five (5) year period (46a), therefore: 1/3 x $9,600 x.5 = $16,000. This was the amount beyond which the Court of Appeals held the verdict excessive, saying:

> "Using this formula, the computation of Interstate's damages becomes simple. Interstate received all but one third of the announcements to which it was entitled. Its damage for one year would be one-third of $9,600 or $3,200 and for five years it would amount to $16,000. *There was no evidence of other damages.*" (318 F.2d 73, 78. Emphasis supplied).

This is entirely consistent with the cases cited by plaintiff. Both *Gardner* v. *The Roycrofters*, 134 App. Div. 45, 118 N.Y.S. 703 and *Tribune Co.* v. *Bradshaw*, 20 Ill. App. 17, hold that in the absence of other evidence the contract price is the proper measure of damages. Other cases cited by plaintiff are to the same effect. The case of *Morristown Lin.-Mer., Inc.*, v. *Lotspeich Pub. Co.*, 42 Tenn. App. 92, 298 S.W.2d 788, appears to dispose of plaintiff's contention that the Court of Appeals has improperly applied the "Western Union" cases, for that decision applied those same cases to an advertising contract, and the Court of Appeals merely follows the holding of the state court in doing likewise, and reaching the conclusion that only damages "such as may fairly be supposed to have en-

tered into the contemplation of the parties when they made the contract, that is such as might naturally be expected to follow its violation" are recoverable for breach of such a contract (318 F.2d 73, 76).

Under plaintiff's theory of the case, the rental to be paid on its building over the ten year period of the lease would have a value of over a million dollars (46a), or, as the Court of Appeals computes it: $1,497,001.92 (318 F.2d 73, 76). Not only, as that Court notes, would this be "a fairly good return on an investment of only $150,000" (318 F.2d 78, 76), but "to say that this was within the contemplation of Interstate and Harding College at the time they entered into the lease requires a wild stretch of the imagination" (318 F.2d 73, 76). And jury verdicts cannot be affirmed upon wild stretches of the imagination, but must be supported by substantial evidence. Without the rate cards, which the Court of Appeals has excluded, there is no such evidence in the record, and the largest amount of damages which can be supported in the record is $16,000. Defendant therefore submits that the Court of Appeals was correct in suggesting a remittitur in excess of that amount.

## QUESTION III.

### The Court of Appeals Has Not Re-written the Contract.

Plaintiff contends that under the opinion of the Court of Appeals it will have no remedy if defendant now or in the future elects not to give plaintiff the remainder of the television time due it under the Lease (which expires in 7 months on June, 1964) and simply tenders plaintiff a check for cash. This statement is absurd because under paragraphs 7 and 8 of the Lease defendant is clearly required to deliver 20 announcements per day *until "plaintiff" elects not to receive them.*

If defendant voluntarily quit giving plaintiff said announcements without plaintiff electing to discontinue receiving them, plaintiff's remedy would be a suit for (1) specific performance, or (2) a mandatory injunction, requiring defendant to deliver any omitted announcements *just as plaintiff could have done in the instant case*, if plaintiff had so desired. Instead, plaintiff voluntarily elected to sue for damages. As the Court of Appeals said (318 F.2d 73, 77): "Interstate did not discontinue taking the announcements, but on the contrary continued to receive them. *It did not want RKO to supply the omitted announcements.* It wanted cash instead." (Emphasis supplied).

Plaintiff's election is binding upon it in the present case, but not in the future. Therefore, there is no way that defendant could ever benefit from a future breach of contract because plaintiff would then have the same number of remedies to select from as it had when it brought suit in the instant case.

Defendant has never omitted any announcements intentionally (169-170a), but in the event defendant were to inadvertently omit any announcements between now and June, 1964, and plaintiff did not elect to sue for specific performance or mandatory injunction, then plaintiff could sue for damages as was done in the instant case. What those damages would be has no bearing upon plaintiff's right to an election of remedies.

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